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# In the Supreme Court of the United States

OCTOBER TERM, 1936

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No. 97

THE UNITED STATES, PETITIONER

*v.*

PERCY K. HUDSON

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*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the Court of Claims (R. 5) is reported in 12 F. Supp. 620. A supplemental opinion (R. 9) overruling the motion for new trial is reported in 13 F. Supp. 640.

### JURISDICTION

The judgment of the Court of Claims was entered on November 4, 1935 (R. 9). The order overruling the motion for new trial was entered March 2, 1936 (R. 10). The petition for a writ of certiorari was filed June 2, 1936 (R. 10), and was granted October 12, 1936. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

## QUESTION PRESENTED

Whether the application of the tax provided for in the Silver Purchase Act of 1934, enacted June 19, 1934, to transfers of interests in silver bullion consummated on May 23 and May 29, 1934, is valid and constitutional under the due process clause of the Fifth Amendment.

## STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in Appendix A (*infra,* pp. 49–52).

## STATEMENT

The special findings of fact of the Court of Claims may be summarized as follows:

On May 3, 1934, respondent purchased futures contracts for the delivery of 500,000 ounces of silver, of which he sold contracts for 350,000 ounces on May 23, 1934, and 150,000 ounces on May 29, 1934, at a profit of $8,621.96 (R. 4).

On July 30, 1934, respondent filed a silver tax return on the foregoing transactions pursuant to the provisions of the Silver Purchase Act of 1934 (*infra,* p. 49), approved June 19, 1934, and duly paid a tax in the amount of $4,311 on the profit realized on the foregoing transactions (R. 4–5).

On August 23, 1934, respondent filed claim for refund of the entire amount of tax so paid, which claim was duly rejected in full (R. 5).

Respondent brought suit in the Court of Claims on October 11, 1934 (R. 1), and on November 4,

1935, the Court of Claims, on the foregoing facts, found the respondent was entitled to recover in the amount of $4,311, the entire amount of the tax paid (R. 9).

## SUMMARY OF ARGUMENT

### I

The Silver Purchase Act of 1934, in authorizing and directing the Secretary of the Treasury to purchase silver until one-quarter of the monetary stocks of the United States consisted of silver, was an exercise of the monetary powers of the Congress. The Congress might well have considered that the retroactive imposition of the tax measured by profits derived from trading in silver was necessary fully to accomplish the purposes of the Act. The proposal to impose the tax retroactively had an unquestioned efficacy in curbing speculation, and thus insured: that the Treasury would not be forced to purchase silver at a speculatively increased price, that the market would not be subjected to a speculative upheaval, and that rejection of the proposed measure would not produce hardship. Since the retroactive tax served to implement the monetary policy, it falls within the well established doctrine permitting any reasonable measure required fully to effectuate the monetary policy.

The broad limits of the Fifth Amendment do not operate to invalidate this measure. The governmental necessity of purchasing a large amount of

silver in a highly sensitive market must be taken to outweigh the relatively slight burdens placed upon the speculator in silver transactions. Such is the practice of many legislatures throughout the world. This taxpayer bought in a period when his transactions were the equivalent of speculation upon the future action of the Government.

II

The tax in question is valid under the taxing power alone. Whatever its philosophical classification, so far as its retroactive effect is concerned it is the substantial equivalent of an income tax. Long continued Congressional policy, often sanctioned by this Court, permits an income tax to be imposed retroactively over a limited period of time. In the cases where this Court has held invalid a retroactive excise tax, the circumstances have been markedly different from those presented by this tax.

## ARGUMENT

### I

### THE TAX WAS A VALID EXERCISE OF THE MONETARY POWERS OF CONGRESS

#### 1. *The Silver Purchase Act as an Element of Monetary Policy*

The significance of silver in the monetary policy of the United States has been emphasized from the earliest days of our nation. As early as 1792

the bimetallic standard was established. (Act of April 2, 1792, c. 16, 1 Stat. 246, 248–249.) With the recurrent legislation relating to the role of silver in the monetary structure there is no present concern. It is sufficient that in the Act of November 1, 1893 (c. 8, 28 Stat. 4), it was provided:

> And it is hereby declared to be the policy of the United States to continue the use of both gold and silver as standard money, and to coin both gold and silver into money of equal intrinsic and exchangeable value, such equality to be secured through international agreement, or by such safeguards of legislation as will insure the maintenance of the parity in value of the coins of the two metals, and the equal power of every dollar at all times in the markets and in the payment of debts. And it is hereby further declared that the efforts of the Government should be steadily directed to the establishment of such a safe system of bimetallism as will maintain at all times the equal power of every dollar coined or issued by the United States, in the markets and in the payment of debts. (31 U. S. C. 311.)

Notwithstanding this policy, by 1934 the silver stocks of the United States stood at the lowest point in its recent history. This appears from the following table supplied by the Treasury to the Ways and Means Committee in the hearings on H. R. 9745, May 25 and 26, 1934 (House Hearings, Silver Purchase Act, p. 32).

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*Percent of monetary stock of silver to total of monetary stock of gold and silver*

| | |
|---|---|
| June 30, 1890 | 40.3 |
| Sept. 30, 1893 | 54.9 |
| Sept. 30, 1895 | 55.8 |
| March 31, 1900 | 42.0 |
| June 30, 1900 | 41.9 |
| June 30, 1905 | 33.6 |
| June 30, 1910 | 30.9 |
| June 30, 1915 | 27.8 |
| June 30, 1920 | 16.2 |
| June 30, 1925 | 16.0 |
| June 30, 1930 | 16.0 |
| June 30, 1933 | 16.8 |
| April 30, 1934 | [1] 10.5 |

Outstanding recent events had foreshadowed action to remedy this unbalanced proportion. The more important of these may be summarized.

In Section 43 of the Agricultural Adjustment Act of May 12, 1933 (c. 25, 48 Stat. 31, 51), it was provided that the President should have authority to fix the weight of gold and silver dollars and the ratio between the two, and to provide for the unlimited coinage of such gold and silver at the ratio so fixed, or, in case the Government of the United States entered into an agreement with other governments establishing the ratio between the value of gold and other currency, such ratio and parity were to be maintained.

In July 1933, at the Monetary and Economic Conference held in London, an agreement was entered into between delegates from the principal silver producing and using nations, including the

[1] The abrupt decline in 1933–34 is due to the revaluation of gold, increasing its monetary value.

United States, designed, among other things, to aid in stabilizing the world price of silver and in widening its monetary use. (48 Stat. 1879.)

On December 21, 1933, the President, by proclamation, directed the United States mints to receive for coinage any domestic silver mined after the date of the proclamation, on a basis yielding approximately 64½¢ an ounce. (48 Stat. 1723.)

On January 15, 1934, the President, in his message to Congress recommending passage of the bill which became the Gold Reserve Act of 1934 (c. 6, 48 Stat. 337), expounded the agreements undertaken at the London conference and the importance of silver in our monetary structure, in contemplation of a marked increase in our use of silver as a basis for currency. (Cong. Record, Vol. 78, pp. 643–644.)

On April 24, 1934, the agreement of the silver countries entered into in July 1933 became effective by ratification of the other nations. (48 Stat. 1879, 1889.)

Between January and May 1934, numerous bills providing for the acquisition of silver were presented in the Senate and House of Representatives. (S. 3039, 3470, 3658; H. Res. 293, 294, 303, 339; H. R. 1577, 6158, 6483, 6854, 7320, 7475, 7581, 7832, 8054, 9242, 9745.) The Dies bill (H. R. 7581), providing for the sale of American agricultural surplus products at the world market price, and accepting in payment therefor silver bullion

at a value up to 25% above the world market price of silver, was passed by the House on March 19, 1934, by a large majority. (Cong. Record, Vol. 78, p. 4863.) During this time there was strong pressure in Congress for legislation requiring the purchase of silver by the Government. These were not merely sporadic demands, but were so persistent and regular as to support a reasonable belief that legislation would be enacted. During this period the Treasury was already buying silver for monetary purposes under the authority conferred in the previous legislation.[2]

Under these circumstances, the Silver Purchase Act of 1934 was enacted. Its purpose is set forth in Section 2 of the Act:

> It is hereby declared to be the policy of the United States that the proportion of silver to gold in the monetary stocks of the United States should be increased, with the ultimate objective of having and maintaining, one fourth of the monetary value of such stocks in silver.

Accordingly, the Secretary of the Treasury, was, in Section 3, "authorized and directed to purchase silver, at home or abroad," so long as the proportion of silver was less than one-quarter of the total monetary stock.

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[2] See the President's message recommending the silver legislation in which he stated—"We have since acquired other silver in the interest of stabilization of foreign exchange and the development of a broader metallic base for our currency."

It is unnecessary to elaborate the purposes to be accomplished by this Act, whether they relate to the stability afforded the monetary structure, to the stimulus given to our foreign trade by purchases of silver abroad, or to the military or diplomatic advantages offered through possession of a large store of silver. It is sufficient that the basic purpose, to increase the silver in the monetary stocks, was one peculiarly within the Congressional province and one which it has unquestioned power to accomplish.

### 2. *The Retroactive Tax was Necessary to Accomplish the Purpose of the Act*

It is unnecessary in this case to consider the tax as imposed upon transactions completed after the enactment of the Silver Purchase Act. Respondent at no stage of this litigation has questioned the obvious power of Congress to implement its monetary policy by such a tax.

The Government submits that the purposes of the Silver Purchase Act could not be accomplished, save with unwarranted difficulty, without the imposition of the tax upon transactions completed shortly before its enactment. The basic question is whether Congress has power to protect itself from obstacles, which might otherwise approach the insuperable, arising from the open and deliberative character of its actions.

The legislative consideration of silver legislation had run throughout the entire session (see pp. 7–8,

*supra*). On May 22, 1934, the President sent a message to Congress devoted entirely to a discussion of the monetary policy of the United States. He suggested "we should move forward as rapidly as conditions permit in broadening the metallic base of our monetary system and in stabilizing the purchasing and debt-paying power of our money on a more equitable level." He called attention to previous Acts looking toward that purpose and recommended legislation to declare it to be "the policy of the United States to increase the amount of silver in our monetary stocks with the ultimate objective of having and maintaining one-fourth of their monetary value in silver and three-fourths in gold." He also said, "There should be a tax of at least 50 percent on the profits accruing from dealing in silver".

The purpose and design of the tax features of the legislation is set forth in unmistakable language in the report of the Ways and Means Committee of the House of Representatives on this bill (73d Cong., 2d Sess., Rep. No. 1801), as follows:

> By such acquisitions the price of silver and gold may also be brought into more proper adjustment. Such an increase in the price of silver will of necessity bring profits to private holders of silver, which profits will accrue through governmental action in the effectuation of a monetary policy for the entire country. It would be

> inequitable for a part of our people to take advantage of governmental action designed to benefit the country as a whole so as to reap large personal profits. The measure accordingly contains two safeguards. It provides that the Secretary of the Treasury may not pay more than 50 cents an ounce for any silver situated in the United States on May 1, 1934. It establishes a transfer tax of 50 per cent of the profits arising out of the holding of silver or contracts for silver. Holders of silver are thus allowed a profit which should at least equal any profits arising from investments in silver or the purchase and sale of silver for industrial use during times when the price is not being increased by governmental action. The tax being in the nature of a profits tax covers transactions taking place prior to enactment. Were this provision not included in the bill, the policy of equitably reimbursing the Government for the increase which its action may bring to the price of silver could be easily obstructed.

It is obvious from the history of the law, as well as from its provisions, that this tax would not have been enacted except as a part of a monetary measure which would inevitably result in increased profits which made taxation appropriate, and it is open to question whether the monetary policy would have been enacted apart from the tax. The Treasury advised the Ways and Means Committee that Section 8, the tax provision, was considered

"vital to the general plan and frame of the bill" (House Hearings, Silver Purchase Act, p. 25).

The considerations which demonstrate the desirability or necessity of the retroactive imposition of the tax are weighty. In the first place, the cost to the Treasury might prove prohibitive if speculation in silver was not curbed. The Secretary of the Treasury was "authorized *and directed*" to make silver purchases in very large volume (see p. 8, *supra*). The inevitable effect of the announcement of this policy by the President in his message to Congress and the consequent probability of its enactment into legislation would be to increase speculative activity and to force the market price upward. The result would be to insure that, by the time the Government was authorized to act, every acquisition would have to be made in a market already driven close to the highest price that could be paid by the Government.[3]

Second, Congress might well have felt it impossible to adopt the Silver Purchase Act if the result of its consideration of the measure would be to subject the silver markets to an upheaval of large

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[3] Section 3 provides that no purchase of silver situated within the continental United States on May 1, 1934, should be at a price in excess of 50 cents per ounce. This was almost 5 cents above the market price at the time of the President's message (see Appendix B, *infra*, p. 53). In addition speculative discounting of the possibility of nationalization of silver (Section 7), in which case at least the fair market value was to be paid, might well force the price even above this limit.

proportion. Not only silver producers and speculators, but a large and important segment of industrial activity is intimately concerned in the price of silver. A sudden advance in the price of silver, which would surely result were the speculative activity uncurbed, would prove embarrassing to all of these industrial users of silver and perhaps catastrophic to some of them. Another group which might well be as liable to disaster as the industrial user, in the event of a sudden rise in the price of silver, are the importers from Oriental markets. Any device which would stabilize the market during the period of Congressional deliberation may well, for this reason alone, have been considered indispensable to the enactment of the Act.

Third, it may often be that the retroactive imposition of a tax is necessary if Congress is to preserve its freedom of deliberation and of genuine consideration of the proposal. Without a curb on speculative price increases, a substantial proportion of the economic activities of the nation may frequently be dependent upon enactment of a proposed bill affecting a speculative market or other highly sensitized commercial situation. Industrial users and exporters and importers might well make commitments on the basis of a sudden price increase which would as abruptly sink back if the

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legislation were not in fact enacted. Investors and speculators would have heavy commitments which would be converted into catastrophic losses were the bill to die in Congress. These considerations could not fail to weigh with Congress as it considered the merits of such a bill. A proposed retroactive tax, in curbing the speculative price increase, could not fail to insure to Congress a greater freedom to accept or to reject as it thought best, and could not fail to insure the industrial and commercial activities of the nation from an important injury which might otherwise arise from the mere fact of legislative deliberation.

Finally, it should be noted that each of these considerations is equally applicable to the converse situation. Should the monetary situation become such as to make desirable legislation providing for the sale by the United States of its silver stocks, it is plain that a Presidential message recommending such legislation would, unless speculative activity were curbed during the period of its consideration, produce a disastrous decline on the silver market. The volume of sales, augmented by short selling, might be such as to destroy the market. This would be no less unsettling than the situation which Congress sought to avoid by the retroactive tax in question.

The Government may have occasion in the future to deal with monetary problems having enor-

mous consequences in both the domestic and international fields. The Congress, alone of the legislative bodies in all the great countries of the world, should not be denied the power adequately to protect its deliberations.

Congress, in considering the means by which to curb speculative activity and maintain an orderly market for silver, chose a tax of 50 per cent of the net profit arising from speculative transactions in silver, retroactive to May 15. The financial records of the period demonstrate, beyond the possibility of argument, that the method was effective.

The weeks of May 15 and May 21 were weeks of large transactions in silver futures, each week recording sales of about 20 million ounces, or from one-thirteenth to one-eighth of the estimated free silver supply in the United States. (See Appendix B, *infra*, p. 53.)

On May 22, the President's message was delivered and the bill was introduced in the Senate without the tax provision. This was omitted on the theory that the tax provision should originate in the House (House Hearings, Silver Purchase Act, p. 67). The day's sales were 7,500,000 ounces, and the following day 6,275,000 ounces. On this day (May 23) the House bill was introduced containing the tax proposal. The following day sales

immediately settled down again to 1,875,000 ounces and remained thereafter at the lower rate. During the remainder of the period prior to enactment of the measure, trading continued in moderate volumes, at no time exceeding 8,250,000 ounces per week.

The evidence that the proposal of a retroactive tax was effective to accomplish its purposes is equally clear when the price movements are examined. On the day the President's message was delivered, May 22, silver stood at 45.51. In spite of the announced purposes of the Act, the price was only 45.59 when the bill became a law on June 19. At no time had it risen above 46.06 or sunk below 44.92, a range of but slightly more than half a cent above or below the figure on May 22. (See Appendix B, *infra*, p. 53.)

The comments of the financial journals of that period make it plain that the tax feature was the operative cause of this condition.[4] For example, the *Journal of Commerce*, on May 26, 1934, states (p. 9):

> It is plainly evident that the determination of the Administration to tax profits on silver speculation 50 per cent is killing trade in silver futures. * * *
>
> * * * This lack of price fluctuation makes for a low trading volume.

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[4] See *The Annalist*, May 25, 1934, p. 815; June 1, 1934, p. 852; *Journal of Commerce*, May 23, 1934, p. 1; May 28, 1934, p. 17.

The absence of wide fluctuations in the world price of silver is proof that the Court of Claims erred in concluding that the Congress could not effectively curb speculation by means of a retroactive tax merely because "the United States produces only a comparatively small portion of the world's stock of silver." (R. 6.) Furthermore, through the exercise of the undoubted power to embargo the exportation of silver together with the imposition of the tax, Congress could control speculation in the large stocks of silver existing in this country regardless of the extent of speculation by foreigners with respect to silver held abroad. The conclusion of the Court of Claims would require the Government to sacrifice its control of the domestic market, one of the most important in the world, merely because it could not achieve world-wide control.

It is important, from the standpoint of orderly governmental procedure, to observe that the recent devaluation of the franc in an orderly fashion was facilitated by means of a provision substantially equivalent to that now under question. The French Monetary Law of October 1, 1936,[5] provides for a tax comparable to the one involved in the present case. Article XIV imposes a special tax of 50% on the net profits arising from "liquida-

[5] Published on page 1040 of the Journal Officiel of October 2, 1936.

tion accounts of forward operations entered into between September 21 and September 26 on French security markets." "Operations corresponding to duly justified commercial requirements will be exempt from this tax." This statute thus imposes a retroactive tax equal to 50% of the profits of persons who, during the week prior to the suspension of the gold standard by France and prior to the convening of the French Parliament for the consideration of monetary legislation, speculated in securities in anticipation of their value increasing as a result of the expected devaluation of the franc. In France, just as in the case at bar, it was deemed reasonable to take away from the speculator at least 50% of the profits he obtained as a result of the Government's monetary program.

Canada, by an act approved June 28, 1934, required the deposit with the Canadian Mint of gold produced in Canada and imposed a tax of 25% on the difference between the price of $20.67 per ounce and the world price of gold. Certain classes of gold were allowed to be exported, but were subject to the same tax. The tax was made retroactive to April 19, 1934, the date the bill was introduced. (Statutes of Canada, 1934, 24–25 George V. pp. 481–483.) Since the increased value of gold produced in Canada resulted from the depreciation of the Canadian dollar, the tax sought to allocate to

the government a portion of this profit and sought also to prevent persons from escaping the tax by disposing of their gold while the measure was being considered by the Canadian Parliament. Similarly, the Indian excise tax upon silver production, passed on April 4, 1930 (Act XVIII of 1930, Indian Trade Journal, Vol. 97, No. 1242, p. 74), was made retroactive to March 17, 1930, when the bill was introduced. (See *The Silver Market,* U. S. Dept. Commerce Trade Promotion Series No. 139 (1932), pp. 43–44.) The retroactive feature was directed toward limiting speculation and preventing a speculative profit at public expense. (See *Wall Street Journal,* March 26, 1930.)

It has, we feel, been demonstrated that the retroactive tax was necessary if Congress were to have full freedom to consider and to enact the Silver Purchase Act, an important element in its monetary policy. At least since the *Gold Clause* cases, *Norman* v. *B. & O. R. Co.*, 294 U. S. 240; *Nortz* v. *United States,* 294 U. S. 317; *Perry* v. *United States,* 294 U. S. 330, there can be no question but that it necessarily follows that Congress had power to impose the tax.

(1) It was within the competence of Congress to determine whether the speculation in silver futures within the period of about a month preceding

the enactment of the Silver Purchase Act constituted an obstruction to the exercise of its monetary power. The Court in the *Norman* case, as to gold clauses in private contracts, said (p. 311):

> Whether they may be deemed to be such an interference depends upon an appraisement of economic conditions and upon determinations of questions of fact. With respect to those conditions and determinations, the Congress is entitled to its own judgment. * * *

(2) Those who make contracts with reference to monetary metal are dealing subject to "those limitations which public policy may require." From the opinion in the *Norman* case we quote (p. 304):

> Moreover, by virtue of this national power, there attach to the ownership of gold and silver those limitations which public policy may require by reason of their quality as legal tender and as a medium of exchange. *Ling Su Fan* v. *United States,* 218 U. S. 302, 310. Those limitations arise from the fact that the law "gives to such coinage a value which does not attach as a mere consequence of intrinsic value." Their quality as legal tender is attributed by the law, aside from their bullion value.

(3) In the exercise of its money power Congress may prohibit and invalidate contracts, although previously made and valid when made, when they

interfere with the accomplishment of a policy it is free to adopt. In the language of the Chief Justice (p. 308) the contracts for gold payment "have a congenital infirmity." If contracts for future delivery of gold in payment of an obligation have a congenital defect which may wholly defeat performance, it is hard to see how a silver futures contract may escape a similar congenital defect sufficient to sustain retroactive taxation over a limited period of 50% of the profit. If those who acquired gold or obligations payable in gold may, as a result of the exercise of the monetary power, have taken away from them the entire increase in value resulting from the devaluation of the dollar, it is difficult to see upon what basis it can be contended that those who make contracts with respect to silver may not in the analogous situation be expected to give up half of their profits.

As the result of the regulation of gold and foreign exchange there was, beginning with March, 1933, no free market for gold in this country, and, while the price of gold in the foreign free markets was rising against the dollar, those markets were closed to Americans. Congress recognized that fairness to all of our citizens required that no speculator or hoarder should make any profits on gold. The effect was the same as if a profits tax of 100 per cent had been imposed on gold and, so far as the obligee is concerned, on gold clause obligations. Because silver is used industrially much more widely than gold, it was not desirable to subject

dealings in silver to as stringent regulations as gold. The tax imposed by the Silver Purchase Act made it possible to avoid constant regulating and licensing of silver transactions, and yet to curb speculation and reserve to the nation a substantial portion of the profits on silver which resulted from the Government's monetary action. (Hearings, H. R. 9745 on Silver Purchase Act of 1934, p. 64.)

The use of the taxing power, at least incidentally, as a defense and shield for the Government, and as an implement for the enforcement of its currency power, is an ancient device fully sustained by the decisions of this Court. The leading case is that of *Veazie Bank* v. *Fenno*, 8 Wall. 533, cited with approval in the recent *Norman* case, *supra*. In the *Veazie Bank* case, there was considered a tax of 10 per cent upon circulating notes of state banks. It was apparent that the tax was prohibitive in purpose and in effect, and that it was intended to deprive state banks of the valuable circulation privileges granted them under the laws of the several States. At page 549 of the decision, after noting that the courts could not prescribe limitations upon the exercise by the legislature of acknowledged powers, and discussing the scope of the monetary powers of Congress, this Court said, in part, "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the

whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation." The *Veazie Bank* case was followed in *National Bank* v. *United States,* 101 U. S. 1, in which this Court sustained a similar tax upon banks paying out notes of cities, towns and municipalities. It was their argument that the tax was intended to destroy such use of such notes, and this Court said at page 6, "The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do."

This Court held, in the *Veazie Bank* and *National Bank* cases, as recognized in the *Norman* case, *supra,* that in the exercise of its monetary power Congress had the right to put an end to all obstructions to the exercise and effectiveness of its money power. It would seem to follow that the tax imposed by the Silver Purchase Act of 1934 cannot be questioned. By that Act, Congress was legislating with relation to the currency of the whole country, and there can be no doubt that Congress was well within its rights in determining that means should be taken to curb speculation, not only from the time of enactment of the law, but from an earlier date approximating that when the proposed legislation was first made public. Whether the transactions here involved be termed investments, or speculations, or mere trades for profit, there is no possible doubt that they were precisely of the

sort which sought to make a profit at the expense of the monetary policy of Congress, or that the cumulative effect of such transactions would be to unsettle the market and greatly to increase the cost of silver to the Government.

### 3. *The Due Process Clause Does Not Invalidate This Tax*

The Government recognizes that, even though adopted to make its monetary measures effective, the retroactive tax is subject to the limitations of the Fifth Amendment. The scope of review which resides in the courts has recently been defined in *Norman* v. *B. & O. R. Co.*, 294 U. S. 240, 311:

> We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decisions of the Congress as to the degree of the necessity for the adoption of that means, is final.

We are here dealing with one of the broadest, most delicate and most essential of governmental powers. It is one which in its nature should not be limited except for most imperative reasons. The scope of the money power was thus described by this Court in the *Norman* case (p. 303):

> The Constitution grants to the Congress power "To coin money, regulate the value thereof, and of foreign coin." Art. I, Sec. 8, Par. 5. But the Court in the legal tender cases did not derive from that express grant

> alone the full authority of the Congress in relation to the currency. The Court found the source of that authority in all the related powers conferred upon the Congress and appropriate to achieve "the great objects for which the government was framed,"—"a national government, with sovereign powers." *McCulloch* v. *Maryland,* 4 Wheat. 316, 404–407; *Knox* v. *Lee, supra,* pp. 532, 536; *Juilliard* v. *Greenman, supra,* p. 438. The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several States, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power "to make all laws which shall be necessary and proper for carrying into execution" the other enumerated powers. *Juilliard* v. *Greenman, supra,* pp. 439, 440.

In speaking of a tax of 72% on the last increment of income and a tax of 50% upon the taxpayer's whole income, which rested solely upon the taxing power of Congress and was alleged to be confiscatory, Judge Learned Hand, in *Towne* v. *M'Elligott,* 274 Fed. 960, 962 (S. D. N. Y.), said:

> It is true that these powers are limited, and that those limits must be observed, however little they circumscribe the analogous

> powers of other Legislatures. Yet when the question is of the interpretation of those broad counsels of moderation contained in the Fifth Amendment, we must interpret the limitations themselves with an eye to the practices which have become tolerated elsewhere among civilized nations. Were it not so, we should be limited forever to the political usages of 1789, and those amendments which were intended to protect the individual against extravagant or invidious discrimination would become a strait-jacket upon the nation's freedom.

In the Court's inquiry whether the retroactive silver tax has "a reasonable relation to a legitimate end" and whether the "broad counsels of moderation contained in the Fifth Amendment" have been observed, the situations both of the taxpayers and of the Government must be considered. The appraisal of their respective positions will show that the private right has been subordinated to the public policy not arbitrarily or capriciously but wisely and with insignificant private hurt compared with the vital necessities of the Government.

Under the Silver Purchase Act the United States was to become a purchaser of a great amount of silver, which might reach the approximate figure of 1,300,000,000 ounces of silver. Estimates placed the amount of free silver in the United States at that time as at from 150,000,000 to 250,000,000 ounces. The Government, therefore, was to be-

come a potential purchaser of an amount of silver greatly exceeding that available in this country (Hearings, H. R. 9745 on Silver Purchase Act of 1934, p. 64).

The Government could not enter the market as would a prudent buyer urged by such a necessity. The silver purchase policy of Congress was necessarily heralded to the world by the processes of formulating the legislation. The Government, accordingly, was in the position of bargaining with speculators who would know its position in advance.

As is developed below, other leading countries may resort to retroactive taxation in defense of their own policies. A denial of the right of the United States in the regulation of its currency to stand on a parity of power with those nations of the world with whose currencies our own is in a position of competition or interdependence would be a sacrifice of the national welfare in the interest of the few who are silver speculators.

It is desirable to prevent persons from profiting as a result of their speculating on action contemplated by a branch of the Government unable to keep its decisions from the public until they have been fully considered and are ready to be put into final effect. The decision to take legislative action, especially in democracies, is made in full view of the public. Messages from the Chief Executive, Committee hearings, debates and delib-

erations in the legislative body are ordinarily immediately reported to the press and made available to the public.

In order to protect the revenues and in order to eliminate, so far as possible, such speculation for private gain as is made possible by the publicity ordinarily attendant upon legislative proceedings, legislatures throughout the world have, as a normal part of their machinery, made use of their power to enact legislation retroactive to the date of the first public notice of the proposed action. The legislation was summarized by Mr. Justice Brandeis in his dissenting opinion in *Untermyer* v. *Anderson,* 276 U. S. 440 (pp. 451–452):

> The problem of preventing loss of revenue by transactions intervening between the date when legislation is introduced and its final enactment, is not a new one; nor is it one peculiar to the gift tax. Other nations have met it by a method similar to that which the Court holds to be denied to Congress. England long ago adopted the practice of makings customs and excise duties retroactive to the beginning of the fiscal year or to the date when the government's resolutions were agreed to by the House of Commons sitting as a Committee of Ways and Means. A similar practice prevails in Ireland, in all the self-governing Dominions, and to some extent in France and Italy. In the United States, retroactive operation of the tariff has been repeatedly recommended by the

> Tariff Commission and by the Secretary of Commerce. Legislation to that end was reported by the Committee on Ways and Means of the House of Representatives. No suggestion seems to have been made that such legislation would by its retroactive feature violate the due process clause.

In addition to the legislation referred to in this opinion, and that mentioned above (*supra,* pp. 17–19), an examination of the Interim Legislation Report of the Tariff Commission, referred to by Justice Brandeis, indicates that Article 35 of the Swiss Customs Law of June 28, 1893 provides that the Federal Council may increase rates of duty, such increase to be subject to subsequent approving legislation. The practice in that country is discussed in Exhibit VI to the above report, which also indicates that Germany, under Article 10 of its customs law of December 25, 1902, Italy under its law of 1883, and Sweden, under Article 60 of its constitution of 1809, followed similar procedures. The report also indicates that the French law of December 13, 1897 provided that bills raising import duties should be put into immediate effect by governmental decree and that if the bills providing for such increase should subsequently fail of passage, taxes collected during the interim were to be refunded accordingly. Article 34 of the French customs law of December 17, 1814, contained similar provisions. (See Exhibit VI A to above report.)

The Executive and Judicial branches of the Government have power to keep secret their deliberations when disclosure prior to decision would be prejudicial. The power to legislate retroactively for this interim period is a compensating power necessarily possessed by legislatures in order that they may act no less effectively. It would be unreasonable that any branch of the Government should, because of the fact that its proceedings are public, be deprived of the power to insure to the nation as a whole that certain classes of persons will not be permitted to speculate for private profit at the public expense. No language of the Constitution requires that this power be denied to the Congress in this instance.

Such were the necessities of the Government. It is submitted that the burden consequently placed on the taxpayer was, in comparison, relatively slight. The following tables relate in point of time, the transactions of respondent to those of the Government:

*1933:*

May 12—Thomas Amendment authorizes unlimited coinage of silver and fixing its ratio to gold.

July—Agreement by London Conference reached.

Dec. 21—President authorizes mints to receive silver on basis of 64½ cents per ounce.

*1934:*

Jan. 15—President's message recommending Gold Reserve Bill.

Apr. 24—London agreement between nations on silver became effective.

*May 3—Respondent purchased silver futures in question.*

May 15—Date retroactive tax effective.

May 22—President's message respecting the acquisition of silver and the imposition of a 50% profits tax. Bill introduced in Senate.

*May 23*—Bill containing retroactive tax feature introduced in House. *Respondent sold part of silver futures.*

May 28—Reported favorably by Ways and Means Committee.

*May 29—Respondent sold remainder of silver futures.*

May 31—Passed House.

June 11—Passed Senate.

June 13—Conference agreement on amendments.

June 19—Approved by President and became law.

The transactions of the taxpayer were entered into long after the price movements on the silver market were largely shaped by government purchases and by speculative conjectures as to governmental action. In purchasing silver futures, for delivery in September, a time after the Act was approved, the taxpayer was in effect speculating on the future developments in the Government's monetary policy. When he closed the transaction by sale of his futures, he was fully aware of the probable passage of the Silver Purchase Act and took the

profit which resulted in large part from the market's prediction of this action. All of his sales were made on or after the day when the House bill, containing the proposal for a retroactive tax, had been introduced. In such a situation the taxpayer hardly has been ill-treated by a tax, retroactive to May 15, which is imposed on the net income from his silver transactions, which were essentially the equivalent of speculating upon the future action of the Government.

It must be borne in mind that, save as there may be a profit due to the mere holding of the silver, there is no retroactive tax placed upon those who by their enterprise or skill produce silver from the mine or who employ it for fabrication or industrial use. Even a transaction in futures is not taxable where it constitutes a hedge by those whose industrial or commercial contracts require them to take a position in the silver market. It is only the speculative profit from the change in the market value of silver which is taxed.

When, under these situations, those who advantage by the Government's financial policies are required to surrender 50% of their profits it can hardly be said that counsels of moderation have failed to prevail. The taxpayer has no vested right in speculative operations in monetary metals against the interests of the sovereign. He has no constitutional right to dig himself into a sheltered position by acting while the sovereign is obliged to deliberate. He should not be permitted to force

the Congress into a position where it would be obliged to rush its deliberations on money policy in order to get into the market ahead of speculators. The Government should be able to protect its period of deliberation against impulsive action by itself or prejudicial action by others in a speculative market of great volatility. None should be permitted to destroy the effectiveness of the monetary power by anticipating its exercise. The Fifth Amendment was not intended to withdraw from the legislature the power to protect its deliberations. Our view of the Fifth Amendment is expressed in language borrowed from Judge Learned Hand in *Cohan* v. *Commissioner*, 39 F. (2d) 540, 545 (C. C. A. 2d):

> * * * limitations like the Fifth Amendment are not like sailing rules, or traffic ordinances; they do not circumscribe the action of Congress by metes and bounds. Rather they are admonitions of fair dealing, whose disregard the courts will correct, if extreme and glaring. Custom counts for much in such matters, and consistency for little; men cannot hope to fit their doings in advance to a pattern which will be sure to endure. The most they can expect is that courts will intervene when the defeat of their expectations passes any measure that reasonable persons could think tolerable, and even their grievance must be fairly outside the zone of possible debate.
>
> So it does not seem to us that the situation here calls for so heroic a remedy as to declare the statute unconstitutional, * * *

In this view of the case, *Untermyer* v. *Anderson,* 276 U. S. 440, has no bearing. This Court was there considering a novel tax, the gift tax, which was imposed with retroactive effect. It was not necessary to the policy of the Act that it be imposed retroactively; the Government would lose nothing but a certain amount of revenue were it confined to a prospective operation. The retroactive tax now under consideration, on the contrary, has been shown to be one which might well have been considered by Congress to be an indispensable feature of its monetary policy. It is submitted, therefore, that the retroactive application of the tax cannot be characterized as either arbitrary or capricious.

An analogous situation was presented in the *Head Money Cases,* 112 U. S. 580. This Court held that the "headmoney" demanded of shipowners was not strictly speaking a tax or duty within the meaning of the Constitution and did not go to the general support of the Government but constituted, rather, a fund raised from those engaged in transportation of passengers for the temporary care of passengers in need. The Court stated (p. 596):

> We are clearly of opinion that, in the exercise of its power to regulate immigration, and in the very act of exercising that power, it was competent for Congress to impose this contribution on the ship owner engaged in that business.

The Court further held (p. 596):

> If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax. In the case of *Veazie Bank* v. *Fenno,* 8 Wall. 533, 549, the enormous tax of eight per cent. per annum on the circulation of State banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created, namely, the legal-tender notes and the notes of the national banks. *It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple.* [Italics supplied.]

This language referred to the limitation on the taxing power as to uniformity, which is found in the Constitution itself. If, however, the express limitations of the taxing power do not apply to the money power, it follows that limitations laid down by the courts upon the taxing power, considered solely as such, do not apply when taxation is a device used in aid of the money power rather than simply for its own sake. For these reasons we do not consider that the tax cases, discussed at a later point, operate as limitations on this tax, whatever their effect might be if this tax were to be justified only as a revenue measure.

## II

### A TAX OF THIS NATURE MAY BE RETROACTIVELY APPLIED UNDER THE TAXING POWER WITHOUT VIOLATION OF THE FIFTH AMENDMENT

A recurrent governmental problem is that of protecting the public revenues from losses which would otherwise occur during the period that revenue legislation is pending. In foreign nations this problem is frequently solved by the retroactive imposition of the tax to cover a limited period prior to its enactment (see pp. 28–29, *supra*). In the United States, as will be developed below, such a practice is of unquestioned validity as applied to certain types of taxes, notably income taxes.

The subject of retroactive taxation under the Silver Purchase Act of 1934, enacted on June 19, 1934 (*infra,* p. 49), is profits resulting from transactions in silver on and after May 15, 1934. The profits to which the tax in this case is applied are derived from sales of future interests in silver made by the taxpayer on May 23 and 29, 1934, less than one month prior to the date of enactment. The silver futures so sold were acquired on May 3, 1934. The Court of Claims in its original opinion referred to the Act as "making the tax apply to purchases made prior to the enactment of the statute" and in discussing the reasonableness of the Act said that "after he had made the purchase his status was fixed and he was caught by a taxing statute which he had no reason to anticipate" (R. 8), and the court further said, "The act which

caused the tax to be applied was the act of purchase. We are of the opinion that the case clearly comes under the rule as stated in *Milliken* v. *United States,* supra, in that the nature and amount of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time he made the purchases and we are therefore constrained to hold that the tax was invalid."

Upon motion for new trial, the Government having called the attention of the court to this obvious error in interpreting the Act and the equally obvious error in constitutional doctrine that the taxing law connot be changed so that at the disposition of property a burden will be imposed that did not exist at the time of its acquisition, the Court of Claims filed a supplemental opinion in which it revoked this reasoning but adhered to its conclusion. (R. 9–10.)

The Court of Claims found the imposition of the tax, on the profit resulting from the transactions here involved, was invalid and unconstitutional and allowed respondent to recover solely because of the retroactive application of the tax, relying wholly on the decisions of this Court in *Nichols* v. *Coolidge,* 274 U. S. 531; *Untermyer* v. *Anderson,* 276 U. S. 440; and *Milliken* v. *United States,* 283 U. S. 15. The Government submits that the doctrine of those cases cannot serve to invalidate a tax such as that here involved.

The nature of the tax perplexed the Court of Claims as appears from its supplemental opinion.

It said, "The tax now under consideration was also novel. It was neither an income tax nor an ordinary sales or excise tax. No such tax had been levied before in the United States nor so far as we can find, in any country." (R. 10.)

There is much confusion about the classification of taxes. Thus the respondent (Br. in Op. 3) contends that the silver tax is a stamp tax, not an income tax. The Court of Claims also treated the tax as a stamp tax. (R. 7.) It clearly held the view that a stamp tax could not be an income tax. We submit that its characterization as a stamp tax merely denotes the manner of its enforcement and in nowise classifies the tax involved. There are two general classes of taxes: (1) direct taxes, and (2) duties, imposts, and excises. *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 557. The Federal income tax in some of its aspects is a direct tax and in other aspects it is an excise. *Willcuts* v. *Bunn*, 282 U. S. 216; *Morrissey* v. *Commissioner*, 296 U. S. 344. It is not a separate class of taxes. Neither do stamp taxes constitute a separate class of taxes. However, they usually fall into the class of excises. *Thomas* v. *United States*, 192 U. S. 363, 371. While excise taxes are commonly collected by means of stamps, we submit that the manner of collection does not serve to classify the tax as an excise, or to militate against its being an income tax. Moreover, in dealing with the tax for the period here involved, that prior to enactment,

the statute provides that it shall be collected in such manner as the Commissioner, with the approval of the Secretary of the Treasury, may by regulations prescribe, and Treasury Regulations 85, Art. 70, *infra*, p. 51, provide that the taxpayer should make a return to the Collector and pay the tax, not by stamps but in the manner in which income taxes are commonly paid. Clearly, if the manner of collection is alone sufficient to classify this tax, it is an income tax for the period here involved.

Excises have been defined as "taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges." Cooley on Constitutional Limitations (7th Ed.), p. 680; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 151. They "usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc." *Knowlton* v. *Moore*, 178 U. S. 41, 88.

Where, in respect of taxation, claim is made of violation of the due process clause, mere classification, terminology, or definition is not material. The determining factor is the practical effect of the operation of the tax. In *Nicol* v. *Ames*, 173 U. S. 509, this Court said (p. 515):

> In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should

> be indulged in for the purpose of placing it in a category which would invalidate the tax. * * * Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, * * *.

See also *Burnet* v. *Wells,* 289 U. S. 670. Cf. *Shaffer* v. *Carter,* 252 U. S. 37; *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219.

In its practical effect and operation the retroactive tax here in question was a tax upon the profit or income resulting from silver transactions. That income, like respondent's other income was subject to the usual income tax even though the Silver Purchase Act had never been passed. It is to be noted that not only were costs and certain expenses deductible, but during the retroactive period active traders in silver were in general permitted to offset trading losses against profits. Coll. Mim. 4211 and T. D. 4450, XIII–2 Cumulative Bulletin 539, 549. In view of the extensive powers of Congress with respect to the allowance of deductions (see *Helvering* v. *Ind. Life Ins. Co.,* 292 U. S. 371; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103), it is immaterial whether the losses allowed are such as in all cases to meet with precision a philosophic definition of net income.

It is immaterial whether this tax would be classified as an income tax for all purposes. See *Flint*

v. *Stone-Tracy Co.*, 220 U. S. 107, 151; *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U. S. 271, 284; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387–388. So far as its retroactive effect is concerned, it stands on precisely the same footing as an income tax. The tax is imposed only on net profits, which the taxpayer would welcome even though he had known in advance that a part of them would be taken by taxation. He has not entered upon a business transaction which, after the event, was made unprofitable by the unforeseen imposition of a tax. His complaint is not that the tax has retroactively changed his transaction into one showing a loss but only that it has taken a part of his profits. Foreknowledge of subsequent events, unless the taxpayer be so exceptional as to renounce the half loaf for desire of the whole, would not have altered his conduct in any particular. It is plain that, so far as its retroactive imposition is concerned, the tax imposed by the Silver Purchase Act has an effect differing in no manner from an income tax and must in this connection be viewed as such a tax.

From the time of the Civil War to the present there have been numerous Federal income-tax Acts, each of which has had retroactive application. Attacks upon the retroactive features of such Acts have uniformly failed. As early as the case of *Stockdale* v. *Insurance Companies*, 20 Wall. 323 (cited with approval in *Brushaber* v. *Union Pac.*

*R. R.*, 240 U. S. 1), in sustaining a provision in an income tax law assailed because of its retroactivity, this Court said (p. 331):

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed.

Likewise in *Lynch* v. *Hornby*, 247 U. S. 339, it was said with respect to an income tax act (pp. 343–344), "That the retroactivity of the act from the date of its passage (October 3, 1913) to a date not prior to the adoption of the Amendment was permissible is settled by *Brushaber* v. *Union Pac. R. R.*, 240 U. 1, 20". Again in *Cooper* v. *United States*, 280 U. S. 409, it was said (p. 411), "That the questioned provision cannot be declared in conflict with the Federal Constitution merely because it requires gains from prior but recent transactions to be treated as a part of the taxpayer's gross income has not been open to serious doubt since *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, and *Lynch* v. *Hornby*, 247 U. S. 399".

That Congress may single out particular classifications of income for special rates is established. See *R. Hoe & Co.* v. *Commissioner*, 30 F. (2d) 630 (C. C. A. 2d), and *Updike* v. *United States*, 8 F. (2d) 913 (C. C. A. 8th), certiorari denied, 271 U. S.

661, holding that the high rate of tax on war profits was not violative of the Fifth Amendment and that the retroactive application of the excess-profits tax in the Act of October 3, 1917, to transactions occurring within the calendar year 1917, was not invalid. Cf. *Shaffer* v. *Carter, supra,* p. 58.

Even were the tax to be viewed as an excise tax, and even if it be ignored that the tax is imposed only on net profits, retroactivity alone does not render it invalid. The sales of future contracts were already subjected to a transfer tax under Subdivision 4 of Schedule A of Title VIII of the Revenue Act of 1926, as amended. That an excise tax may be increased retroactively or have retroactive features is well settled. *Patton* v. *Brady,* 184 U. S. 608; *Billings* v. *United States,* 232 U. S. 261; *Hecht* v. *Malley,* 265 U. S. 144.

However the tax may be classified, its retroactive imposition is not arbitrary, unreasonable or capricious. It is clear that retroactivity is not enough to warrant this characterization. The nature of the tax, the circumstances surrounding its imposition, and the practical effect and result of the exaction, must all be considered when its validity is questioned. If after considering these factors the taxing act is shown to be so arbitrary and capricious and lacking in reasonableness as to constitute, not taxation, but confiscation, then intervention to prevent retention of the tax is justified.

The facts and circumstances surrounding the enactment of the Silver Purchase Act and the im-

position of the tax are such as to make it apparent that the retroactive application of the tax could not be considered to be arbitrary, capricious, or unreasonable. These circumstances have been reviewed in discussing the monetary powers of the Congress, and are equally applicable here.

Retroactivity, of itself and alone, does not render a tax unconstitutional. In this case respondent asserts such a claim under the authority of *Untermyer* v. *Anderson,* 276 U. S. 440. There it was held that a gift tax, imposed upon a gift consummated before the law imposing the tax was enacted, was invalid as a taking of property without due process of law. But the decision in the *Untermyer* case was not grounded on the mere fact of the retroactive application of the statute. This was clearly shown in *Milliken* v. *United States, supra,* where a retroactive tax statute was assailed, citing the *Untermyer* case, and this Court, in sustaining the tax in the *Milliken* case said (pp. 21–22):

> But a tax is not necessarily and certainly arbitrary and therefore invalid because retroactively applied, and taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed and considered by the Court. See *Stockdale* v. *Insurance Companies,* 20 Wall. 323, 331; *Railroad Co.* v. *Rose,* 95 U. S. 78, 80; *Railroad Co.* v. *United States,* 101 U. S. 543, 549; *Flint* v. *Stone Tracy Co.* 220 U. S. 107; *Billings* v. *United States,* 232 U. S. 261,

282; *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 20; *Lynch* v. *Hornby*, 247 U. S. 339, 343; *Hecht* v. *Malley*, 265 U. S. 144, 164; *Cooper* v. *United States*, 280 U. S. 409. See *Taft* v. *Bowers* [278 U. S. 470, 482]; *United States* v. *Heinzen*, 206 U. S. 370; *Graham* v. *Goodcell*, 282 U. S. 409.

The rule drawn by the Court of Claims from *Nichols* v. *Coolidge* and *Untermyer* v. *Anderson*, *supra*, "that if at the time a citizen enters into a transaction it is not taxable and he has no reason to believe or expect a tax will in the future be imposed by reason of it, a valid tax thereon cannot be laid by a subsequent statute" (R. 6), is so far as applied to these circumstances in conflict with the principles applied and enunciated by this Court in *Cooper* v. *United States* and *Milliken* v. *United State*, *supra*.

Accordingly, we submit, this case is controlled by the decisions of this Court in *Cooper* v. *United States* and *Milliken* v. *United States*, *supra*, in both of which retroactive taxation was sustained. In the *Cooper* case, this Court declined to hold invalid an income tax on the "gains from prior but recent transactions" (p. 411). In the *Milliken* case, it was said (p. 23):

> Not only was the decedent left in no uncertainty that the gift he was then making was subject to the provisions of the existing statute, but in view of its well understood purpose he should be regarded as taking his

> chances of any increase in the tax burden which might result from carrying out the established policy of taxation * * *.

Respondent knew that profits realized on his transfers would be subject to income taxation such as had been prevalent in this country since 1913. He also knew that not only the profits but also the transfers themselves were taxable in view of subdivision 4 of Schedule A of Title VIII of the Revenue Act of 1926, as amended. Accordingly he had such warning, within the rule laid down in the *Milliken* case, that he justly may be regarded as taking his chances of retroactive application to him of a tax such as is involved in this case.

The instant case is readily distinguishable from *Nichols* v. *Coolidge*, 274 U. S. 531, and *Untermyer* v. *Anderson, supra*. As pointed out by this Court in *Cooper* v. *United States, supra* (p. 412), those cases "gave no consideration to the power of Congress to require that taxable income should *include profits from transactions consummated within the year.*" (Italics supplied.) In *Nichols* v. *Coolidge* the Act of Congress reached back and dealt with a transfer which took place a dozen years before the law was passed and attributed to the property its value long after the transfer. Here the transfers were made less than one month before the law was passed. The *Untermyer* case concerned a gift tax imposed upon a gift made before the law was enacted. There is a material differ-

ence between retroactively taxing a gift and retroactively taxing the net gain from a business transaction. Mr. Untermyer would have been compelled to surrender an additional amount by way of taxes in consequence of having made a gift, tax free at the time, while the respondent here merely relinquished a part of his profit. Mr. Untermyer could well contend that he would not have parted with his property by gift had he known that subsequently he would have to pay a gift tax. The respondent here cannot say that he would not have chosen to realize a profit on his silver transactions had he known the profit was to be subsequently taxed.

The support for the tax, the past benefits, are much more apparent in the case of the gain than they are in the case of the gift. Especially is this the case when the profits themselves arise from speculation as to the Government's monetary policy. And it is settled that a tax may be imposed on past benefits. *Wagner* v. *Baltimore,* 239 U. S. 207; *Rafferty* v. *Smith Bell & Co.,* 257 U. S. 226; *Forbes Boat Line* v. *Comm'rs.,* 258 U. S. 338; *Graham & Foster* v. *Goodcell,* 282 U. S. 409.

## CONCLUSION

The retroactive imposition of the tax contained in the Silver Purchase Act has been shown to be necessary fully to implement the monetary powers of Congress. It has been shown to be a legitimate

means to a necessary end, and not to impose exceptional hardship upon the silver speculator. Apart from its function as a corollary of the monetary policy of Congress, the tax may be considered as a revenue measure alone. So viewed, its retroactive effect is precisely similar to that of an income tax, which Congress has unquestioned power to impose retroactively.

For these reasons it is respectfully submitted that the judgment of the Court of Claims should be reversed.

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NOVEMBER, 1936.

## APPENDIX A

Silver Purchase Act of 1934, c. 674, 48 Stat. 1178, 1179:

SEC. 8. Schedule A of title VIII of the Revenue Act of 1926, as amended (relating to stamp taxes), is amended by adding at the end thereof a new subdivision to read as follows:

"10. Silver, and so forth, Sales and Transfers.—On all transfers of any interest in silver bullion, if the price for which such interest is or is to be transferred exceeds the total of the cost thereof and allowed expenses, 50 per centum of the amount of such excess. On every such transfer there shall be made and delivered by the transferor to the transferee a memorandum to which there shall be affixed lawful stamps in value equal to the tax thereon. Every such memorandum shall show the date thereof, the names and addresses of the transferor and transferee, the interest in silver bullion to which it refers, the price for which such interest is or is to be transferred and the cost thereof and the allowed expenses. Any person liable for payment of tax under this subdivision (or anyone who acts in the matter as agent or broker for any such person) who is a party to any such transfer, or who in pursuance of any such transfer delivers any silver bullion or interest therein, without a memorandum stating truly and completely the information herein required, or who delivers any such memorandum without having the

proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000 or be imprisoned not more than six months, or both. Stamps affixed under this subdivision shall be canceled (in lieu of the manner provided in section 804) by such officers and in such manner as regulations under this subdivision shall prescribe. Such officers shall cancel such stamps only if it appears that the proper tax is being paid, and when stamps with respect to any transfer are so canceled, the transferor and not the transferee shall be liable for any additional tax found due or penalty with respect to such transfer. The Commissioner shall abate or refund, in accordance with regulations issued hereunder, such portion of any tax hereunder as he finds to be attributable to profits (1) realized in the course of the transferor's regular business of furnishing silver bullion for industrial, professional, or artistic use and (a) not resulting from a change in the market price of silver bullion, or (b) offset by contemporaneous losses incurred in transactions in interests in silver bullion determined, in accordance with such regulations, to have been specifically related hedging transactions; or (2) offset by contemporaneous losses attributable to changes in the market price of silver bullion and incurred in transactions in silver foreign exchange determined, in accordance with such regulations, to have been hedged specifically by the interest in silver bullion transferred. The provisions of this subdivision shall extend to all transfers in the United States of any interest in silver bullion, and to all such

transfers outside the United States if either party thereto is a resident of the United States or is a citizen of the United States who has been a resident thereof within three months before the date of the transfer or if such silver bullion or interest therein is situated in the United States; and shall extend to transfers to the United States Government (the tax in such cases to be payable by the transferor), but shall not extend to transfers of silver bullion by deposit or delivery at a United States mint under proclamation by the President or in compliance with any Executive order issued pursuant to section 7 of the Silver Purchase Act of 1934. The tax under this subdivision on transfers enumerated in subdivision 4 shall be in addition to the tax under such subdivision. This subdivision shall apply (1) with respect to all transfers of any interest in silver bullion after the enactment of the Silver Purchase Act of 1934, and (2) with respect to all transfers of any interest in silver bullion on or after May 15, 1934, and prior to the enactment of the Silver Purchase Act of 1934, except that in such cases it shall be paid by the transferor in such manner and at such time as the Commissioner, with the approval of the Secretary of the Treasury, may by regulations prescribe, and the requirement of a memorandum of such transfer shall not apply."

* * * * *

Treasury Regulations 85:

ART. 70. *Returns.*—Every person who on or after May 15, 1934, and before the enactment of the Silver Purchase Act of 1934 made any transfer of any interest in silver bullion shall, on or before July 18, 1934, file with the collector for the district in which is

located his principal place of business (or, if none, his residence) or if he has no principal place of business or residence in the United States, with the collector at Baltimore, Md., a return in duplicate under oath on form 4 (silver) showing all such transfers and the following facts with respect to each:

(a) Date of the transfer.

(b) Name and address of transferee (except in the case of a futures contract liquidated by an offsetting futures contract).

(c) The interest in silver bullion transferred or to be transferred.

(d) The price for which such interest was or is to be transferred.

(e) The date and manner of acquisition (or production when that is the basic date).

(f) The cost of such interest (except as provided in art. 72). The facts upon which the cost is based shall be stated in detail.

(g) Whether or not the interest was acquired in a wash sale.

(h) The allowed expenses, if any.

(i) The tax, if any, on each transfer.

# APPENDIX B

## DEALINGS IN SILVER FUTURES ON THE NEW YORK COMMODITY EXCHANGE

### *May 15 to June 19, 1934*

Prepared by the Division of Research and Statistics, Treasury Department, on the basis of figures of the Commodity Exchange, released daily and also published in the New York Times and the Wall Street Journal.

| Date | Average Price | Volume |
|---|---|---|
| May 15 | 44.78 | 1,125,000 |
| May 16 | 44.43 | 5,200,000 |
| May 17 | 45.32 | 5,825,000 |
| May 18 | 45.35 | 5,925,000 |
| May 19 | 45.52 | 1,350,000 |
| Weekly Average | 45.08 | |
| Weekly Volume | | 19,425,000 |
| May 21 | 45.70 | 1,750,000 |
| May 22 | 45.51 | 7,500,000 |
| May 23 | 45.29 | 6,275,000 |
| May 24 | 45.07 | 1,875,000 |
| May 25 | 45.16 | 1,875,000 |
| May 26 | 45.19 | 850,000 |
| Weekly Average | 45.32 | |
| Weekly Volume | | 20,125,000 |
| May 28 | 45.22 | 925,000 |
| May 29 | 45.34 | 1,175,000 |
| May 30—Holiday | | |
| May 31 | 45.23 | 1,325,000 |
| June 1 | 45.02 | 1,500,000 |
| June 2 | 44.92 | 1,825,000 |
| Weekly Average | 45.15 | |
| Weekly Volume | | 6,450,000 |
| June 4 | 45.06 | 950,000 |
| June 5 | 45.14 | 900,000 |
| June 6 | 45.67 | 2,400,000 |
| June 7 | 45.59 | 1,725,000 |
| June 8 | 45.59 | 1,500,000 |
| June 9 | 45.68 | 775,000 |
| Weekly Average | 45.46 | |
| Weekly Volume | | 8,250,000 |
| June 11 | 45.47 | 1,175,000 |

| Date | Average Price | Volume |
|---|---|---|
| June 12 | 45.51 | 1,775,000 |
| June 13 | 46.06 | 3,050,000 |
| June 14 | 45.72 | 1,525,000 |
| June 15 | 45.36 | 350,000 |
| June 16 | 45.05 | 125,000 |
| Weekly Average | 45.53 | |
| Weekly Volume | | 8,000,000 |
| June 18 | 45.36 | 950,000 |
| June 19 | 45.59 | 3,000,000 |
| Average | 45.48 | |
| Volume | | 3,950,000 |

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